No. 22312

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD M. CLARIDGE and KAY T. CLARIDGE, his wife, et al.,

and

STATE OF ARIZONA, EX REL., OBED M. LASSEN,

Appellants

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of Judge Walter E. Craig (R. 107-118) is reported at 279 F.Supp. 87.

JURISDICTION

The order of the district court of September 25, 1967, contained the appropriate language certifying the partial decision

in favor of the United States for an interlocutory appeal (R. 117-118). Appellants filed timely application for appeal under 28 U.S.C. sec. 1292(b), which was granted on October 31, 1967 (R. 129). Jurisdiction of this Court rests on 28 U.S.C. sec. 1292(b).

ISSUES PRESENTED

1. Whether the entire area between the boundaries of the Palo Verde Valley through which flows the Colorado River in a shifting course is the bed of the Colorado River because for a few weeks of most years prior to 1935 the flood waters of the river overran the area.

2. Whether stabilization of the flow of the Colorado through the Palo Verde Valley by the Hoover Dam enlarged or diminished Arizona's title to land in the valley.

STATEMENT

The United States filed this suit to quiet title, to evict the Claridges, and for damages to the land resulting from the occupancy (R. 1). The Claridges asserted title to be in the State of Arizona and alleged justification of their occupancy under a lease from the State of Arizona executed subsequent to the filing of this suit. The State of Arizona intervened,

alleging title on the grounds that this land is located between the thread of the Colorado River and its easterly ordinary high water mark. At the trial before the district court sitting without a jury evidence was presented to show the various changes in the location of the main channel of the river from 1874 through 1935 and the types of vegetation found in the valley. At the close of the evidence and after oral argument the court found that the land was not within the bed of the Colorado River, that the United States had title to the land, that the defendants had no rights in the land, and retained jurisdiction to determine damages to the United States if any (R. 119-128). Subsequently the court entered a supplemental judgment containing the requisite findings to permit application for an interlocutory appeal.

The essential physical facts in this case are not seriously disputed. They are for the most part set forth fully in the district court's opinion and findings (R. 107-114) and may be summarized as follows:

The land in question is in the Arizona portion of the Palo Verde Valley east of the present channel of the Colorado

River, about one and one-half miles south of Ehrenburg. Except for a narrow arm, or corridor, which abuts the present east bank of the river channel, the land is about one-fourth of a mile east of the present bank of the river channel.

The valley is about 15 miles from north to south and at the point in question is about eight miles wide. The floor of the valley is alluvial soil deposited by the river as it meandered across the valley and eroded from the Arizona bluff on the east and the California bluff on the west. The area encompassed was acquired by the United States from Mexico in 1848 under the Treaty of Guadalupe Hidalgo, 9 Stat. 922.

The Colorado River at this point is a navigable stream and the State of Arizona holds title to the land under the river from the thread to the easterly ordinary high water mark. State of Arizona v. State of California, 283 U.S. 423 (1930).

The Colorado River has been, at peak flow, a turbulent river carrying large quantities of water and with it large quantities of silt and alluvion. Since 1874, when the first attempt was made to measure and establish the flow and exact location of the river, its meanderings have been generally on the

Arizona side. Its various locations with respect to this land at all times from 1874 to 1964 is generally agreed by the parties and is described at R. 110-113. A convenient demonstration of the meanderings as related to this land is shown by the overlay map placed in evidence by the Government in connection with Mr. McEwan's testimony (Gov't Ex. 7, T. 5-168, 523-535).

Pursuant to the Act of June 17, 1902, 32 Stat. 388, all public lands within six miles east of the ordinary high water mark of the Colorado River were withdrawn by Executive Orders of January 31, 1903, and February 19, 1929, including the instant land insofar as it is east of the ordinary high water mark. In 1935, the gates of the Hoover Dam upstream from this property were closed, 1/ and since then the river has been relatively stabilized to flow in its present position.

At the trial, appellees produced testimony as they suggest (Br. 17) that in most, but not all, years prior to 1935, water flowed over this land for a period of a few days to several weeks. They also produced witnesses who testified that no

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1/ The Hoover Dam was constructed pursuant to the Boulder Canyon Project Act of 1928, 43 U.S.C. sec. 617.

much farming was accomplished between the bluffs prior to 1935, although one had experimented with barley and harvested the crop before the late spring or summer floods (T. 105). Appellees concede that the valley area was used for cattle grazing (Br. 21). Witnesses also testified and the Government conceded that the vegetation of the valley area was different from that east of the bluffs.

The Government's evidence was substantially that set forth by the court as to the meanders of the river over the period from 1877 to 1964 and to point out that even prior to 1935 there was considerable terrestrial type vegetation including trees in the area in question (T. 21, 142-145, 241-242, 245, 256-258).

The district court viewed the property, found the facts to be substantially as set forth above and determined that:

> 1. It is immaterial to determine the location of the ordinary high water mark of the river in 1912 or subsequent dates, other than the date at which defendants claim title or right to possession.
>
> 2. The present ordinary high water mark of the river exists by virtue of the

Hoover Dam and other dams upstream from the lands in question.

3. The lands in question are located to the east of the present ordinary high water mark of the Colorado River.

* * * * *

6. No part of the lands in question lie within the bed of the Colorado River from the thread of the river to its easterly bank, or otherwise.

The court concluded:

1. The ordinary high water mark of a river is a natural physical characteristic placed upon the lands by the action of the river. It is placed there, as the name implies, from the ordinary flow of the river and does not extend to the peak flow or flood stage so as to include overflow on the flood plain, nor is it confined to the lowest stages of the river flow.

2. The ordinary high water mark of the Colorado River at the location in question is within the existing banks of the river to the west of the lands in question, regardless of the activity by the United States in constructing certain works within the river to confine and improve the channel, which work has been undertaken within the purview of the Boulder Canyon Project Act. 43 U.S.C. § 617 et seq.

3. The lands in question were established by accretion or reliction from the action of the Colorado River, or by both, and were accreted to or relicted to lands owned by the United States, withdrawn from entry by lawful

> action of the United States in 1903 and 1929; the title thereto is presently in the United States.

Accordingly this partial judgment on the merits in favor of the United States was entered (R. 117-118). This appeal followed (R. 129).

ARGUMENT

I

THE BED OF A NAVIGABLE RIVER IS DETERMINED BY THE ORDINARY HIGH WATER MARK

Introduction. - The issue in this case is quite simple. The area in question was acquired from Mexico in 1848 under the Treaty of Guadalupe Hidalgo, 9 Stat. 922. Appellants' claim is that the land is a part of the bed of the Colorado River, a navigable stream. Such title was confirmed by the Submerged Lands Act of 1953, 67 Stat. 29, 43 U.S.C. sec. 1301(a)(1) which, in effect, quitclaimed to the state

> * * * all lands * * * covered by non-tidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, * * * up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction * * *. (Emphasis added.)

Clearly under this Act which merely confirmed the existing law in this respect, both the United States and the State of Arizona gain or lose title as the river shifts its course by accretion, erosion and reliction. Beaver v. United States, 350 F.2d 4 (C.A. 9, 1965). Although appellants' brief contains some statements indicating disagreement with the district court's determination that the lands in question are the result of accretion or reliction of the Colorado River (Br. 24-26) no serious attack on this determination is mounted. For example no real effort is made to show a particular movement of the river was avulsive so as to fix title to this, or any, particular area at any particular date in the past. Consequently, we are left only to determine what is the bed of this navigable river, the Colorado, in this area.

Use of the term "high water mark" is really a short-hand way of summarizing, somewhat inexactly like all generalizations, the substantial body of law on this subject. For example one of the classic cases does not even use the term. The Supreme Court in Alabama v. Georgia, 64 How. 505, 515 (1859) stated:

> * * * the bed of the river is that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn.

Earlier the Supreme Court in rejecting ordinary low water as the boundary in Howard, et al. v. Ingersoll, 54 How. 380 (1851) stated:

> When banks of rivers were spoken of, those boundaries were meant which contain their waters at their highest flow, and in that condition they make what is called the bed of the river. They knew that rivers have banks, shores, water, and a bed, and that the outer line on the bed of a river, on either side of it, may be distinguished upon every stage of its water, high or low; at its highest or lowest current. It neither takes in overflowed land beyond the bank, nor includes swamps or low grounds liable to be overflowed, but reclaimable for meadows or agriculture, or which, being too low for reclamation, though not always covered with water, may be used for cattle to range upon, as natural or uninclosed pasture. But it may include spots lower than the bluff or bank, whether there is or is not a growth upon them, not forming a part of that land which, whether low or high, we know to be upland or fast lowland, if such spots are within the bed of the river. Such a line may be found upon every river, from its source to

> its mouth. It requires no scientific exploration to find or mark it out. The eye traces it in going either up or down a river, in any stage of water. * * *

Again in Oklahoma v. Texas, 260 U.S. 606 (1923), the Supreme Court reiterated the foregoing and concluded at pp. 631-632:

> Upon the authority of these cases, and upon principle as well, we hold that the bank intended by the treaty provision is the waterwashed and relatively permanent elevation or acclivity at the outer line of the river bed which separates the bed from the adjacent upland, whether valley or hill, and serves to confine the waters within the bed and to preserve the course of the river, and that the boundary intended is on and along the bank at the average or mean level attained by the waters in the periods when they reach and wash the bank without overflowing it. When we speak of the bed we include all of the area which is kept practically bare of vegetation by the wash of the waters of the river from year to year in their onward course, although parts of it are left dry for months at a time; and we exclude the lateral valleys which have the characteristics of relatively fast land and usually are covered by upland grasses and vegetation, although temporarily overflowed in exceptional instances when the river is at flood.

Through practical application of these principles, primarily in state courts, the "high water mark" definition has

become controlling. See e.g., Provo City v. Jacobson, 111 Utah 39, 176 P.2d 130, 132 (1947); City of Peoria v. Central Nat'l Bank, 224 Ill. 43, 79 N.E. 296 (1906); Wilcox v. Penny, 250 Iowa 1378, 98 N.W.2d 720, 723 (1959); Raide v. Dollar, 34 Idaho 682, 203 Pac. 469, 471 (1921). One of the most frequently cited decisions is Welch v. Browning, 115 Iowa 690, 692-694, 87 N.W. 430, 431 (1901), where the court set forth an appropriate guideline for practical application:

> The question as to what in law constitutes ordinary high-water mark is the leading question in this case. It therefore becomes necessary to define what the law regards as ordinary high-water mark. It does not mean the height reached by unusual floods, for these usually soon disappear. Neither does it mean the line ordinarily reached by the great annual rises of the river, which cover in places lands that are valuable for agricultural purposes, since the waters brought by these annual rises do not usually remain permanently, or for any great length of time, and crops may be raised on the soil as the water subsides. Nor yet does it mean meadowland adjacent to the river, which, when the water leaves it, is adapted to and can be used for grazing and pasturing purposes. (Emphasis added.)

The Court of Appeals for the Third Circuit has had the most recent occasion to deal with this very practical concept of defining a river bed. In Borough of Ford City v. United States, 345 F.2d 645 (1965), the Court stated at p. 648:

> This principle is followed in a great number of well considered opinions some of which are cited below. We are satisfied that the sound law as to what constitutes the river bed of a navigational stream is as carefully outlined in the Harrison opinion i.e. the land upon which the waters have visibly asserted their dominion, the value of which for agricultural purposes has been destroyed. The value for agricultural purposes is destroyed where terrestrial plants not all plant life ceases to grow. Just as definitely the same law is that the bed of such stream "* * * does not extend to or include that upon which grasses, shrubs and trees grow though covered by the great annual rises." Harrison v. Fite, supra 783.
>
> The vegetation test is useful where there is no clear, natural line impressed on the bank. If there is a clear line, as shown by erosion, and other easily recognized characteristics such as shelving, change in the character of the soil, destruction of terrestrial vegetation, and litter, it determines the line of ordinary high-water. Rutten v. State, 93 N.W.2d 796, 799 (N.D. 1958); Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914);

> Willis v. United States, 50 F.Supp. 99 (W. Va. 1943). Also a test of the distinct line is the destruction of terrestrial vegetation so these are not really two separate tests but must, of necessity, complement each other.

As might well be expected in the search for a practical workable rule, the courts gradually shifted to an expression of principle defined in physical terms. Thus, we have now accepted the "vegetation line" in those situations where there is no other practical method of ascertaining the limits of the bed of the river. For example, United States v. Chicago B. & Q. R. Co., 90 F.2d 161, 170 (C.A. 7, 1937), defines the limits as follows:

> The line of ordinary high water divides the upland from the riverbed. The riverbed is the land upon which the action of the water has been so constant as to destroy vegetation. It does not extend to nor include the soil upon which grasses, shrubs and trees grow. Harrison v. Fite (C.A. 8, 1906) 148 Fed. 781.

See also Harrison v. Fite, 148 Fed. 781 (C.A. 8, 1906); Willis v. United States, 50 F.Supp. 99, 100 (W. Va. 1943).

Application of these practical considerations, which are the embodiment of the law, to the facts of the instant case demonstrates the lack of merit in appellants' broad assertion that the entire Palo Verde Valley from the Arizona bluffs to the California bluffs (8 miles at the point in issue) is the bed of the Colorado River (Br. 22, 25). For, although appellants' brief pretends to be directed at various and more narrow questions, the substance of it is an assertion that the bed of the Colorado River in 1912, the date of Arizona's admission as a state, and at all times thereafter until 1935 when the Hoover Dam was closed, was all lands between the bluffs on the California side and the bluffs on the Arizona side of the Palo Verde Valley. The contention is that the entire valley is the riverbed.

In this case, we can virtually dismiss the "vegetation line" on the basis of the stipulated facts and the evidence at the trial. It was agreed that the vegetation in the valley differed from that beyond the bluffs. Of course it did. As the court has noted the historic and prehistoric facts, the valley is an alluvial plain which because of soil conditions and

water table level would have different vegetation from the area beyond the bluffs. Perhaps, the most important fact to be noted at this point is that the area appellants claim to be riverbed is and has been for many years prior to 1935 replete with vegetation, trees, grass and shrubs and has been used for farming and cattle grazing. Clearly there is no "vegetation line" outside the banks of the present bed that would aid appellants.

As the quotations from the Supreme Court, supra, show ascertainment of the banks of the Colorado is something subject to visual perception--no magic formula is required. It must be recalled that the district court heard the testimony, examined the exhibits, physically inspected the area and, as is plain from the conclusions, applied the appropriate criteria. Such a determination based as it is on ample support in the record is not clearly erroneous and as this court has stated "must be treated as unassailable." Wittmayer v. United States, 118 F.2d 808, 811 (1941); Rule 52(a) F.R.Civ.P.; International Boxing Club v. United States, 358 U.S. 242 (1959).

Under strikingly similar factual circumstances the Supreme Court in Oklahoma v. Texas, 260 U.S. 606 (1923), disposed of a bluff to bluff claim, as appellants made here, in clear terms at p. 635:

> This survey of the physical situation demonstrates that the banks of the river are neither the ranges of bluffs which mark the exterior limits of the valley, nor the low shifting elevations within the sand bed. * * *

So here the banks of the Colorado are not now and have never been the bluffs marking the exterior limits of the valley.

II

THE CONSTRUCTION AND OPERATION OF THE HOOVER DAM IN 1935 AND THEREAFTER NEITHER REDUCED NOR ENLARGED ARIZONA'S TITLE TO LAND IN THE PALO VERDE VALLEY

As we have demonstrated in Point I, supra, the bluffs marking the exterior limits of the river valley are not and never were the banks of the Colorado River so as to include the entire valley in the bed of the stream. Referring again to the overlay and other relevant exhibits (Statement, supra, p. 5) it is clear that since 1874, the river has gradually shifted its course over a wide range in the area here involved. As the court

noted, this action has created upland by accretion and reliction (Statement, supra, pp. 6-8). Conversely, of course, the same action has created or caused different areas to become riverbed. Consequently, the district court was clearly correct, having rejected the bluff to bluff theory, in finding it unnecessary to determine exactly where the riverbed was in 1912. At any given point in time thereafter, the boundary between land owned by the United States and land owned by the State of Arizona changed as the bed of the river and its easterly bank changed through accretion and reliction. 2/ Beaver v. United States, 350 F.2d 4 (C.A. 9, 1965); Arkansas v. Tennessee, 246 U.S. 158, 173-174 (1918); Nebraska v. Iowa, 143 U.S. 359, 360-361 (1892); Philadelphia Co. v. Stimson, 223 U.S. 605, 624 (1912).

Application of similar logic and familiar legal principles demonstrates that operation of Hoover Dam beginning in 1935 has caused no accretion nor reliction nor any change in

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2/ Although appellants apparently concede that Arizona recognizes accretion and reliction (Br. 8) we point out that federal law controls in this situation anyway. Hughes v. State of Washington, 389 U.S. 290 (1967); United States v. State of Washington, 294 F.2d 830 (C.A. 9, 1961), cert. den., 369 U.S. 817.

ownership. Since the entire valley was never the riverbed, the Dam did not change that aspect. All the Dam accomplished was a stabilization of the river flow. Thus, rather than reduce the area owned by Arizona as riverbed, the Dam has merely indirectly inhibited, to some extent, the owned area in its former gradual wanderings over the floor of the valley.

But even if (as does not appear) some accretion or reliction was caused in part by operation of the Dam, the result would be the same. As this Court stated in Beaver v. United States, 350 F.2d 4, 11 (1965).

> The erecting of artificial structures does not alter the application of the accretion doctrine (County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46, 50-66, 23 L.Ed. 59 (1874)), unless, perhaps, structures are erected for the specific purpose of causing the accretion. * * *

No one would contend that the United States constructed the Hoover Dam for the purpose of enlarging its title in the instant area or any other area on the Colorado River by accretion. Hoover Dam was constructed for the purpose of improving navigation and to store water for supplying the growing needs of Arizona and California. In fact, Arizona benefits to the extent of 3,000,000 acre feet of water per year.

CONCLUSION

For the foregoing reasons, the order of the district court should be affirmed.

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